No. 22-

IN THE

Supreme Court of the United States

CITY OF ARLINGTON,

Petitioner,

v.

DE'ON L. CRANE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rather than submit to arrest pursuant to multiple lawfully issued arrest warrants, a suspect who was pulled over for a traffic violation refused to exit his vehicle or even turn off his car's engine. Ultimately, three police officers arrived on the scene. After repeated commands to turn off the engine and exit the vehicle were ignored, the defendant officer entered the rear of the vehicle, at which point: the suspect struggled with the defendant officer; the engine revved causing the tires to spin, and the vehicle to smoke and sway from side to side; the vehicle went into reverse, running over another officer; the vehicle then went into drive running over that officer a second time; and the suspect fled the scene with the defendant officer still struggling with the suspect, partly in and partly out of the car. The defendant officer fired his service pistol during the melee, resulting in the suspect's death. The questions presented are:

(1) Where a suspect with an outstanding felony arrest warrant refuses repeated commands to turn off his car and exit the vehicle, clearly states he will not surrender, struggles with an officer in the vehicle while revving the car's engine, making the tires spin, and causing the car to smoke and sway from side to side, would a reasonable officer, who is half in and half out of the vehicle, conclude that the suspect poses a risk of serious harm to the officer or others?

(2) Does a police officer attempting to execute a lawful arrest warrant against a suspect in a car who is struggling with the officer and revving his vehicle, making the tires spin and causing it to smoke and sway side to

side, "obviously" violate the suspect's Fourth Amendment rights by deploying deadly force just before the car reverses running over his fellow officer?

(3) Can the mere existence of a municipal policy of allowing traffic stops, lawful under *Whren v. United States*, 517 U.S. 806 (1996), without more, constitute the moving force behind a subsequent unlawful use of force sufficient to impose municipal liability for such use of force?

PARTIES TO THE PROCEEDING

Petitioner the City of Arlington was one of the Defendants-Appellees in the Court of Appeals.

Craig Roper was the other Defendant-Appellee in the Court of Appeals.

Respondents De'On L. Crane, individually and as the administrator of the estate of Tavis M. Crane and on behalf of the statutory beneficiaries, G.C., T.C., G.M., Z.C. and A.C., the surviving children of Tavis M. Crane; and Alphonse Hoston were Plaintiffs-Appellants in the Court of Appeals.

Z.C., individually, by and through her guardian Zakiya Spence, Dwight Jefferson, and Valencia Johnson were also Plaintiffs-Appellants in the courts below.

RELATED PROCEEDINGS

Crane v. City of Arlington, No. 4:19-cv-0091-P, (N.D. Tex. June 8, 2021) (reported at 542 F. Supp. 3d 510)

Crane v. City of Arlington, No. 21-10644 (5th Cir. September 30, 2022) (reported at 50 F.4th 453)

Crane v. City of Arlington, No. 21-10644 (5th Cir. February 24, 2023) (reported at 60 F.4th 976) (*per curiam*)

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STATUTES AND OTHER AUTHORITIES:

The City of Arlington (the "City") respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's panel opinion is reported at 50 F.4th 453. Appendix A 1a-26a. That court's order denying panel rehearing is not reported. Appendix D at 44a-45a. That court's order denying rehearing *en banc* is reported at 60 F.4th 976. Appendix C at 36a-43a. The Northern District of Texas's opinion is reported at 542 F. Supp. 3d 510. Appendix B at 27a-36a.

JURISDICTION

The district court entered a final judgment in favor of the City and Officer Roper on June 8, 2021. The plaintiffs timely appealed, and the Fifth Circuit entered judgment on September 30, 2022, revised October 4, 2022. Petitioner filed timely motions for rehearing and rehearing *en banc*, which were denied on February 24, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Petitioner seeks the Court's review under Supreme Court Rule 10 because the Fifth Circuit decided important federal questions in a way that conflicts with the relevant decisions of this Court as well as other United States courts of appeal, and the Fifth Circuit decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

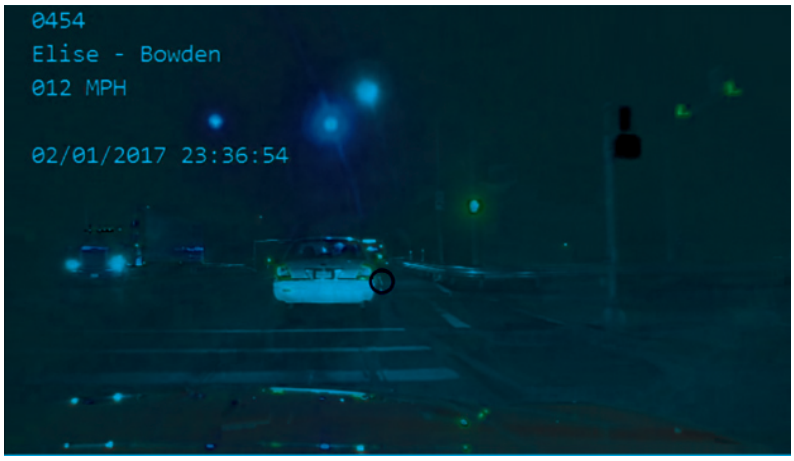
42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On February 1, 2017, Tavis Crane ("Crane") was driving in Arlington, Texas with three passengers, including his two-year-old daughter. Pet. App. 4a. While Crane was stopped at a traffic light at approximately 11:38 p.m., Arlington Officer Elise Bowden ("Officer Bowden")

pulled up behind him. *Id.* at 4a-5a. After the light turned green, Crane pulled away from the intersection and Officer Bowden saw an object being tossed from the passenger's side of the car. *Id.*at 5a. The dashcam video from Officer Bowden's patrol car clearly shows the object, which appears to be a glass pipe, being thrown from the car window. The cylindrical object being dropped from the car can be seen, circled in green, in the screen captures below. The object appears much more clearly in the running video. *Id.* at 6a, 28a.



Officer Bowden turned on her police car's lights and Crane pulled over. Pet. App. 5a. Officer Bowden approached the passenger side of the vehicle and asked Crane for his driver's license and proof of insurance. *Id.* Crane provided Officer Bowden an identification card because he did not have a driver's license. *Id.* Officer Bowden then returned to her vehicle and ran a routine driver's license and warrant check, which indicated that Crane was wanted on five warrants, including one felony warrant for violating parole on an evading-arrest charge. *Id.*

Due to these warrants, and the car's three other occupants, Officer Bowden called for backup. Pet. App. 5a., 28a. Two other officers arrived, including defendant Officer Roper, and together they approached the car—which was still running. *Id.* at 6a. Officers Bowden and Roper stood on the driver's side. *Id.* Officer Bowden respectfully asked Crane to get out of the car. *Id.* He refused. *Id.*

Demonstrating model policing, Officer Bowden politely, calmly, and firmly negotiated with Crane—for more than two minutes—to turn the car off and step out of the car. Pet. App. 29a. But he refused. *Id.* As this continued, Crane's initial cooperation vanished and was replaced with hostility. *Id.* He would not listen to Officer Bowden and justified himself by saying he had done nothing wrong. *Id.* The officers started to suspect that Crane would drive off, and the passenger-side officer asked the front-seat passenger to turn the car off. *Id.* at 6a-7a, 29a. Crane stopped the passenger and said that he was not turning the car off. *Id.*

As Crane's resistance hardened, Officer Roper gestured for the backseat passenger to unlock her door. Pet. App. 7a, 29a. She complied, and Officer Roper opened the door. *Id.* He stepped into the car, one foot in and one foot out. *Id.* The tension immediately and drastically increased. *Id.* At this point, Officer Roper unholstered his pistol and aimed it at Crane. *Id.* One of the other two officers scrambled around the car, trying to bust the windows so he could reach in and turn off the ignition. *Id.* The scene was chaotic. Pet. App. 30a. Inside the car, Officer Roper used his left arm to wrestle with Crane, and his right hand had his gun pressed against Crane's side. *Id.* Officer Roper threatened to kill Crane if he would not turn the car off. *Id.* at 29a-30a. During this struggle, Crane pressed the gas down, causing the car's engine to roar, tires to spin, and sending smoke up around the car. *Id.* at 7a, 30a.

The following events occurred very quickly. The third officer broke the window next to Crane with his baton. Pet. App. 7a. As Officer Bowden started to run around the back of the car, the car launched into reverse, plowing over Officer Bowden, and smashing into her police car. *Id.* at 30a. Crane's car then changed gears and took off forward. *Id.* The gear shift was on the steering column. *Id.* As the car moved forward, the back of Crane's car visibly rises and falls as it runs over Officer Bowden a second time. *Id.* As Crane's car continues down the street, an officer radios out, "officer down!" *Id.* Somewhere amidst this chaos, Officer Roper point-blank shot Crane in the ribs. *Id.* The backseat passenger claims the shot occurred just before the car started reversing, while the officers claim Officer Roper fired his gun after the car ran over Officer Bowden the second time. *Id.* Either way, as the car sped

down the road, Officer Roper—hanging partially out the open back door—shot Crane two more times. Pet. App. 30a. Officer Roper then managed to put the car into neutral and guide it to a controlled stop into a curb. *Id.* Crane was later pronounced dead. *Id.*

The Plaintiffs sued the City and Officer Roper under 42 U.S.C. § 1983. Pet. App. 8a. The district court dismissed the bystander Plaintiffs' claims and granted Officer Roper's motion for summary judgment. Pet. App. 8a-9a, 35a. In granting summary judgment, the district court determined that the Plaintiffs had failed to demonstrate that Officer Roper's use of force was clearly excessive. *Id.* at 34a. In so holding, the district court accepted the Plaintiffs' version of the events as true, namely that Officer Roper fired the first shot before the vehicle went into reverse. *Id.* Even under the Plaintiffs' version, the undisputed facts established that Crane had not been complying for more than two minutes; he was wanted on a parole violation for evading arrest; he refused to turn the car off and he rolled up the windows; inside the running car were four occupants, including a toddler, and outside the car were two officers; the car was on a residential street; and Officer Roper was half-in and half-out an open door. *Id.* Given these undisputed facts, the district court determined that it was reasonable for Officer Roper to conclude that Crane posed a threat of serious harm to both Officer Roper and others. *Id.* Because the district court determined that Crane's Constitutional rights had not been violated, it also granted judgment in favor of the City. *Id.* at 35a.

The three-judge panel of the Fifth Circuit reversed. Pet. App. 1a-26a. In so doing, the panel first suggested

that *Monell* liability under § 1983 could be predicated on a municipal policy of allowing pretextual stops otherwise lawful under *Whren v. United States*, 517 U.S. 806 (1996). *Id.* at 2a-4a. The panel opinion then held that the district court erred in discounting the Plaintiffs' version of the incident and determined that a fact question existed regarding whether Officer Roper fired his service pistol just before or just after Crane ran over Officer Bowden. *Id.* at 11a-13a. According to the panel opinion, if Officer Roper fired his service pistol just before the car shifted into reverse and ran over Officer Bowden, these facts present the rare "obvious case" of a Constitutional violation. *Id.* at 23a.

The City sought panel rehearing. Both the City and Officer Roper sought rehearing *en banc*. The petitions for rehearing were denied. Pet. App. 36a-45a. Six judges voted in favor of rehearing. Ten opposed. In his opinion concurring in the denial of rehearing *en banc*, Justice Ho indicated he would have voted to affirm the district court's order but opposed rehearing because of its futility. Commenting on the Fifth Circuit's § 1983 cases, Judge Ho observed:

> "We grant qualified immunity to officials who trample on basic First Amendment rights—but deny qualified immunity to officers who act in good faith to stop mass shooters and other violent criminals." As a result, "officers who punish innocent citizens are immune—but officers who protect innocent citizens are forced to stand trial. Officers who deliberately target citizens who hold disfavored political views face no accountability—but officers who make split-

> second, life-and-death decisions to stop violent criminals must put their careers on the line for their heroism."

Pet. App. 39a-40a (*internal citations omitted*) (*quoting Gonzalez v. Trevino*, 60 F.4th 906 (5th Cir. 2023)). Judge Oldham authored the dissent to the order denying rehearing *en banc*. In the dissent, joined by Judges Jones, Smith, Duncan and Wilson, Judge Oldham summarizes the case as follows:

> Officer Roper made a split-second decision to shoot a noncompliant driver (Crane) in the heat of a wrestling match just before Crane twice ran over another officer with his car. For several minutes, Crane (who had five outstanding warrants) repeatedly ignored commands to turn off and exit the car. Crane then pressed the accelerator causing the tires to spin and smoke and the engine to rev. At this point, Officer Roper sensibly concluded that Crane was going to kill or seriously injure someone using a three-ton projectile—so he shot Crane. It's all on video. And if a picture is worth 1,000 words, query how much this video is worth.

Pet. App. 42a. Judge Oldham then laments that the Fifth Circuit's refusal to rehear this case "sow[s] the seeds of uncertainty in [its] precedents—which grow into a briar patch of conflicting rules, ensnaring district courts and litigants alike." *Id.* at 43a.

REASONS FOR GRANTING THE PETITION

I. THE PANEL OPINION IGNORES THIS COURT'S PRECEDENT AS WELL AS ITS OWN REGARDING SPLIT-SECOND JUDGMENTS.

The Fifth Circuit has repeatedly held that "[a]n officer's use of deadly force is not excessive . . . when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or others." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009) (*citing Ontiveros v. City of Rosenberg,* 564 F.3d 379, 382 (5th Cir. 2009); *see also Francis v. Garcia*, 702 Fed. Appx. 218, 221 (5th Cir. 2017); *Hatcher v. Bement*, 676 Fed. Appx. 238, 243 (5th Cir. 2017); *Mace v. City of Palestine,* 333 F.3d 621, 624 (5th Cir. 2003); *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011); *Valderas v. City of Lubbock*, 937 F.3d 384, 390 (5th Cir. 2019); *Wilson v. City of Bastrop*, 26 F.4th 709, 713 (5th Cir. 2022). These cases are all the progeny of *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, this Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11.

However, in applying *Garner*, this Court cautioned that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving . . ." *Graham v. Connor*, 490 U.S. 386, 388 (1985). The video in this case makes clear that Officer Roper faced exactly the type of "tense, uncertain, and rapidly evolving" circumstances described

in *Graham* when he was forced to make the split-second decision under scrutiny here. Yet, the panel opinion makes no allowance for this in making its reasonableness determination. Instead, the panel opinion concludes that this is an "obvious case" of a Fourth Amendment violation. Pet. App. 23a. In so doing, the panel opinion entirely ignored the district court's determination that the facts, *as alleged by the Plaintiffs*, did not demonstrate a Constitutional violation.

Rather than consider the facts, as alleged by the Plaintiffs, the panel opinion identified a single disputed fact, upon which the district court's opinion did not rest, and determined that summary judgment was improper. It did so without evaluating the case through the lens of the undisputed facts with which Officer Roper was presented: at the time the Plaintiffs allege force was used, Crane had not been complying with the Officers' commands for more than two minutes; a felony warrant had been issued for Crane's arrest on a parole violation for evading arrest; Crane refused to turn the car off and rolled up the windows; inside the running car were four occupants, including a toddler; outside the car were two more officers; the car was on a residential street; and Officer Roper was half-in and half-out an open door. Pet. App. 33a. During the struggle that ensued, "Crane pressed the gas down, causing the car's engine to roar, tires to spin, and sending smoke up around the car." *Id.* at 30a.

To justify reversal of the district court's summary judgment, since these facts are undisputed, the panel opinion simply ignores them. Instead, the panel opinion focuses on whether Officer Roper fired the first shot just before or just after Crane put the car in reverse and ran

over Officer Bowden twice. This fact, though disputed, is not material. The indisputable video evidence makes clear that, under *Garner* and *Graham*, Officer Roper could reasonably believe that Crane posed a serious threat to Officer Roper and others *before* the car ran over Officer Bowden. We know that Crane posed a serious threat of harm to the officers on the scene. Officer Bowden suffered a career-ending injury when the car driven by Crane ran over her, not once, but twice. This alone demonstrates the objective reasonableness of the perception that Crane posed a serious threat at the time Officer Roper employed deadly force. This is true regardless of whether that force was applied before or after Crane ran over Officer Bowden. As such, there is no basis for finding a Constitutional violation here.

II. THIS IS AN IDEAL VEHICLE TO ADDRESS THE QUESTIONS PRESENTED AND PROVIDE GUIDANCE ON THE APPLICATION OF THE RARE OBVIOUS CASE EXCEPTION.

This case presents an ideal vehicle for providing much needed guidance on the important issue of police conduct while attempting to take a resistant suspect into custody, as well as what constitutes an "obvious case" of excessive force under the Fourth Amendment. The Fifth Circuit relied on *Brosseau v. Haugen*, for the proposition that, even without clear existing precedent, the unlawfulness of an officer's conduct can nevertheless be "obvious." Pet. App. 23a; *see Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (*citing Hope v. Pelzer*, 536 U.S. 730, 733 (2002)). In an "obvious case" of a Constitutional violation, the law is considered "clearly established" without the need to show precedent addressing a factually similar scenario. *Id.*

In this case, the Fifth Circuit held that an obvious Fourth Amendment violation occurred under the following undisputed facts: at the time the Plaintiff alleges force was used, Crane had not been complying with the Officers' commands for more than two minutes; a warrant had been issued for Crane's arrest on a parole violation for evading arrest; Crane refused to turn the car off, rolled up the windows and had clearly communicated to the officers that he would not surrender voluntarily; inside the running car were four occupants, including a toddler; outside the car were two more officers; the car was on a residential street; and Officer Roper was half-in and half-out an open door. Pet. App. 33a. During the struggle that ensued, "Crane pressed the gas down, causing the car's engine to roar, tires to spin, and sending smoke up around the car." *Id.* at 30a.

The facts of this case are remarkably similar to the facts in *Martin v. City of Newark*, 762 Fed. Appx. 78 (3rd Cir. 2018). In *Martin,* the police pulled over a driver after observing erratic driving. With the driver's door open, an officer positioned himself between the driver and the driver's door. The car was not running. Ignoring the officer's command, the driver started the car. Here the parties' factual versions diverge. According to the police officer, the driver started to accelerate the car with some portion of the police officer's body still inside the car, pulling him down the street, at which point the police officer shot the driver three times. According to the driver, the officer was never dragged by the car, the police officer shot him first and the car moved only *after* the driver was shot. *Id.* at 80-81.

Both the district court and the Third Circuit determined that the officer's conduct was objectively

reasonable, *as a matter of law*. *Martin*, 762 Fed. Appx at 83. In affirming the summary judgment in favor of the officer, the Third Circuit held that the officer's conduct was objectively reasonable based on the following facts: the officer faced an erratic and noncompliant driver who disregarded his explicit warning not to start the car, the driver posed a threat to the officer's life: being injured by a moving vehicle, and, *even assuming that the car had not yet moved at the time of the shooting*, a reasonable officer would have feared for his life under the circumstances. *Id*. at 83.

In *Martin*, the Third Circuit made clear that the officer was not required to wait for the car to move before deploying deadly force. *Id.* The Fifth Circuit in this case reached the opposite conclusion on the same set of facts. Pet. App. 16a ("the car was not a threat until it began to move, which did not occur until Roper shot Crane."). The panel opinion here requires Officer Roper to refrain from using deadly force until the car was already moving. However, by the time the car started reversing, there was *no opportunity* to avoid the career-ending injury to Officer Bowden. As is clear from the video of the incident, the time that elapsed from the moment the backup lights illuminate on the car driven by Crane until it had actually run over Officer Bowden the first time, was less than two seconds, not nearly enough time to prevent the injury. The threat of flight was clearly imminent. That flight threatened Officer Roper, who was half in and half out of the car. It threatened the other two officers, who were next to and, at times, behind the car and one of whom suffered serious injuries after being run over twice. It threatened the passengers who were in the car. While the car could not cause injury until it moved, Crane threatened flight when he refused to exit his vehicle or otherwise be taken

into custody, refused to turn off his car and struggled with Officer Roper. The Fourth Amendment does not require the police to wait to respond to a threat of harm until a response can no longer terminate the threat. *Long v. Slaton*, 508 F.3d 576, 581 (11th Cir. 2007); *see also Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) ("[A]n officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force.").

In *Martin,* the Third Circuit also rejected the argument, advanced by Plaintiffs in this case, that the facts presented an "obvious case" of a Fourth Amendment violation. *Id.* If a Constitutional violation is obvious, it would be obvious to all. Yet, in this case, both the district court and the dissenting judges on the Fifth Circuit all concluded that no Constitutional violation had occurred, *as a matter of law.* Similarly, the Third Circuit Court of Appeals in *Martin,* under a nearly identical set of operative facts, also concluded that no Constitutional violation had occurred, *as a matter of law.* This case, even when viewed in the light most favorable to the Plaintiffs, does not present an "obvious case" of a Fourth Amendment violation.

The issues raised in this petition have been well vetted by the court of appeals. Judge Ho's concurrence along with Judge Oldham's dissent from the denial of rehearing *en banc* highlight the profound consequences of the panel opinion and the Fifth Circuit's failure to consistently address the issues raised in this case. Here, rather than addressing the specific facts of this case, the Fifth Circuit's opinion announces a single proposition of law with a high degree of generality which is certain to have repercussions in future litigation. The panel opinion holds

that it is obvious that a police officer cannot "use deadly force on an unarmed man in a parked car." Pet. App at 23a. As noted by Judge Oldham in his dissent from the order denying rehearing *en banc*, the panel opinion's use of the "obvious case" exception swallows the rule established in *Mullinex* that "in split-second excessive-force cases, it's 'especially important' to define clearly established law with specificity and not at a 'high level of generality.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

The Fifth Circuit's "obvious case" determination allows for only one conclusion: the defendant officer was required to wait until the suspect shifted the car into reverse and began the process of running over Officer Bowden before he could use deadly force. The reasonableness requirement of the Fourth Amendment does not require the police to wait for a suspect to inflict harm. The conduct, which all parties agree occurred before the first shot, clearly allowed a reasonable officer to believe that Crane constituted a threat to Officer Roper, the other occupants of the car and the other officers on the scene, as the ensuing facts sadly confirmed. This Court should reject the Fifth Circuit's "obvious case" analysis and reaffirm that Fourth Amendment excessive force cases must be decided on the specific facts of each case.

III. THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH OPINIONS FROM OTHER CIRCUITS.

In addition to the conflict with the Third Circuit's holding in *Martin*, the panel opinion is also in conflict with cases from at least the First, Sixth and Eleventh Circuits as well.

In *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 1183 (2015), the First Circuit held that an officer acted reasonably in firing multiple shots at a driver who was attempting to resume a high-speed chase after crashing into a stone wall and a telephone pole. The officer fired two shots when the car was driving toward him and two more when it was driving away from him, possibly toward another officer. *Id.* at 28. The First Circuit held that the officer's conduct was objectively reasonable given the risk to himself, the risk to another officer, and the risk that the driver "'would once again pose a deadly threat for others' if he had resumed his flight." *Id*. at 29 (quoting *Plumhoff,* 134 S. Ct. at 2022).

In *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), the Sixth Circuit held that an officer did not act unreasonably when he shot a fleeing driver after the immediate danger to officers on the scene had passed. The officer's use of force was deemed reasonable because he reasonably believed that the driver "posed a continuing risk to the other officers present in the immediate vicinity." Id. at 377.

The Eleventh Circuit explicitly rejected the premise upon which the Fifth Circuit's opinion rests, that police violate the Fourth Amendment by shooting a suspect in a car which is stopped at the moment the shots are fired. Rather, all of the attendant circumstances must be taken into account, including the suspect's refusal to surrender and the police officer's commands for the suspect to get out of the car, to determine whether the suspect poses a threat to the officers or the public. *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002). In *Pace*, the Eleventh Circuit held that an officer did not act unreasonably when

he fired two shots at a suspect in a car that, at the time the shots were fired, was not moving. After the first two shots were fired, the car began to move, and additional shots were fired. The suspect was killed. As in this case, before shooting the suspect, the police ordered him to get out of the car. The suspect, like Crane, made it clear to the police that he would not surrender voluntarily.

Similarly, in *Long v. Slaton*, 508 F.3d 576, 581 (11th Cir. 2007), the Eleventh Circuit held that a police officer did not violate a suspect's Fourth Amendment rights by shooting the suspect in a car which was backing away from the officer. Even if the suspect did not pose an "immediate" threat, the court held that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." *Id.* The court noted that the officer gave the suspect a clear warning, as did Officer Roper in this case, and it rejected the plaintiffs' argument that the officer should have used "alternative means" to apprehend the suspect. *Id*. at 583. Here, not only did Officer Roper give Crane a clear warning that he would be shot, but this was also after the officers had negotiated with Crane for several minutes to no avail, and after Crane made clear to the officers on the scene that he would not willingly surrender into their custody.

In *Tillis v. Brown*, 12 F.4th 1291 (11th Cir. 2021), the Eleventh Circuit determined than a police officer did not violate the Fourth Amendment when he fired 21 shots into a suspect's car commencing as soon as the car was shifted into reverse. *Tillis,* 12 F.4th at 1299. "Officer Brown was on foot next to his vehicle, where he was exposed to danger. The Pontiac could have struck him as it drove past him.

Indeed, the plaintiffs' expert witness estimated that the Pontiac passed within two feet of Officer Brown. In close proximity to a moving vehicle, with only seconds to react, Officer Brown had reason to believe that his life was in danger." *Id.*

The requirements of the Fourth Amendment should not vary from judicial district to judicial district. Neither should they vary, as they do so often in the Fifth Circuit, from panel to panel. This Court should take this opportunity to correct the Fifth Circuit's error and provide much needed guidance on the issues raised herein.

IV. THE COURT SHOULD REJECT THE FIFTH CIRCUIT SUGGESTION THAT MUNICIPAL LIABILITY UNDER *MONELL* MAY BE PREDICATED UPON A MUNICIPAL POLICY AUTHORIZING LAWFUL PRETEXTUAL STOPS.

In the panel decision, the panel opines:

> While several major cities have restricted the practice, in much of America, police traffic stops still seine for warrants despite the shadows of *Monell v. Department of Social Services*,[1] where a § 1983 claim can succeed against a city with a showing that city policy was the moving force behind a constitutional injury, and was implemented with deliberate indifference to the known or obvious consequence that constitutional violations would result. The potential liability attending a policy of pretextual

1. 436 U.S. 658 (1978).

> stops aside, their empirical consequences are clear: they lead to the unnecessary and tragic ending of human life.

Pet. App. 3a-4a.

The panel opinion concedes, as it must, that pretextual traffic stops are constitutionally permissible. *Whren v. United States*, 517 U.S. 806, 810 (1996). While pretextual traffic stops might, under the appropriate circumstances, offend the equal protection clause of the Fourteenth Amendment, no such allegations are advanced in this case. In fact, the Plaintiffs have not even alleged that the stop in this case was pretextual. Regardless, this Court has made clear that excessive force claims arising out of traffic stops must be analyzed for reasonableness under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388 (1989); *County of Los Angeles v. Mendez*, 581 U.S. 420, 427-28 (2017). Here, the panel opinion conflates the issues of whether the stop was lawful and whether the force used was clearly excessive, urging that a lawful stop could nevertheless lead to *Monell* liability for a coincidental subsequent use of force.

It is also clear that, even if the traffic stop was not lawful, which has not been argued here, if the use of force was reasonable, there is no constitutional violation for excessive force. This is so because the reasonableness of the use of force is measured at the time the decision to employ the force is made. *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014). There is no recognized causal chain between the constitutionality of a traffic stop and any subsequent use of excessive force. This is especially true in this case where the decision to conduct the traffic stop

was made by one officer, Officer Bowden, and the decision to use deadly force was made by another officer, Officer Roper.

The panel opinion implicitly criticizes Officer Bowden for not simply letting the unlicensed driver drive away after she determined that the object thrown from the car was likely part of a candy cane. "Bowden laughed about the misunderstanding and handed the red piece back to Z.C. *But she did not send the family on.* Rather, she returned to her vehicle and ran a warrant check on the unlicensed driver, which found that Crane had warrants for several misdemeanors and a possible felony probation violation." Pet. App. 5a (*emphasis added*).

The panel opinion ignores the significance of the fact, clearly established in the video record, that by the time Officer Bowden realized the object was likely not drug paraphernalia, she had already determined that Crane was operating the car without a driver's license, a separate criminal offense authorizing detention. Tex. Penal Code § 521.025. Moreover, this Court has made clear that inspecting a driver's license and insurance and checking for outstanding arrest warrants do not infringe one's Fourth Amendment rights.

> Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." *Caballes*, 543 U.S., at 408, 125 S. Ct. 834, 160 L. Ed. 2d 842. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration

> and proof of insurance. *See Delaware v. Prouse*, 440 U.S. 648, 658-660, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). *See also* 4 W. LaFave, Search and Seizure §9.3(c), pp. 507-517 (5th ed. 2012). These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. *See Prouse*, 440 U.S., at 658-659, 99 S. Ct. 1391, 59 L. Ed. 2d 660; LaFave, Search and Seizure §9.3(c), at 516 (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

Rodriguez v. United States, 575 U.S. 348, 355 (2015); *see also Utah v. Strieff,* 579 U.S. 232, 241 (2016) (officer's decision to run a warrant check is lawful).

When Officer Bowden checked to see if Crane had any outstanding warrants, she learned he did. Having learned of the warrants, including a felony warrant, the officers on the scene were obligated to effectuate an arrest. *Utah v. Strieff*, 579 U.S. 232, 240 (2016) ("once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff."). "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." *Id.* (*quoting United States v. Leon*, 468 U.S. 897, 920, n. 21 (1984)).

The panel opinion places police officers in a precarious position. They have a sworn duty to protect the public and preserve the peace within the officer's jurisdiction. Tex. Code of Crim Pro. Ann. Art. 2.13. Having initiated a traffic stop based upon probable cause, albeit for a minor

infraction, and having determined that the driver of the car had outstanding warrants for his arrest, the officers were required to execute the warrants and take Crane into custody with all the attendant uncertainties and dangers. The panel opinion, without pleadings, briefing or argument to support it, strikes at the very heart of core police procedures. It questions the lawfulness of traffic stops for which the officer had probable cause. It questions the practice of confirming that the operator of the vehicle possesses a valid license to drive and is insured. It questions the practice of checking for outstanding warrants for the driver's arrest and it questions the decision to effectuate an arrest to execute such warrants.

Recognizing that there is no pattern of incidents that would give rise to an unconstitutional policy as required by *Monell*, the panel cites to a law review article and newspaper articles, not part of the record, as if the facts asserted thereon are uncontested. The panel's opinion then theorizes that municipal liability may be founded merely on an otherwise constitutionally permissible "policy of pretextual stops" noting that "several major cities have restricted the practice." The panel opinion suggests that, had the City adopted a policy similar to Los Angeles, Philadelphia or Seattle, Crane might still be alive. Even assuming such a policy might have changed the outcome, neither the policy preferences of the panel nor another municipality establishes the applicable Constitutional standard. Predicating liability under § 1983 on Constitutionally permissible routine traffic stops and warrant checks which coincidentally result in a use of force when the driver resists arrest, is nothing more than *respondeat superior* liability, which this Court has clearly rejected. *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989). Similarly, theorizing that routine traffic stops

supported by probable cause might be unlawful because the policies of a few jurisdictions prohibit them not only conflicts with *Whren*, but also implicates "serious questions of federalism." *Id.* at 391-92.

The panel opinion goes too far in urging that *Monell* liability may be founded on routine and Constitutionally permissible traffic stops. The Court should grant this petition to correct the Fifth Circuit's error.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 30, 2022, REVISED OCTOBER 4, 2022

REVISED 10/4/22

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10644

DE'ON L. CRANE, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TAVIS M. CRANE AND ON BEHALF OF THE STATUTORY BENEFICIARIES, G. C., T. C., G. M., Z. C., AND A. C., THE SURVIVING CHILDREN OF TAVIS M. CRANE; ALPHONSE HOSTON; DWIGHT JEFFERSON; VALENCIA JOHNSON; Z. C., INDIVIDUALLY, BY AND THROUGH HER GUARDIAN ZAKIYA SPENCE,

Plaintiffs-Appellants,

versus

CITY OF ARLINGTON, TEXAS; CRAIG ROPER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CV-91.

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges.*

Appendix A

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

In 1996, the Supreme Court approved the use of pretextual stops in *Whren v. United States*.[1] Since then, pretextual stops have become a cornerstone of law enforcement practice.[2] Police officers follow a suspicious person until they identify a traffic violation to make a lawful stop, even though the officer intends to use the stop to investigate a hunch that, by itself, would not amount to reasonable suspicion or probable cause.[3] Often pulled over for minor traffic violations, these stops create grounds for violent—and often deadly—encounters that disproportionately harm people of color.[4]

When *Whren* was decided, the Court did not have what we have now—twenty-five years of data on the effects of

1. 517 U.S. 806, 810, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

2. David D. Kirkpatrick, Steven Eder & Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, N.Y. TIMES (Apr. 15, 2022), https://www.nytimes.com/2022/04/15/us/police-traffic-stops.html.

3. Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 640 (2021).

4. *See* Sam Levin, *US Police Have Killed Nearly 600 People in Traffic Stops Since 2017, Data Shows*, GUARDIAN (Apr. 21, 2022), https://www.theguardian.com/us-news/2022/apr/21/us-police-violence-traffic-stop-data ("Black drivers make up 28% of those killed in traffic stops, while accounting for only 13% of the population. Research has consistently found that Black and brown drivers are more likely to be stopped, searched and subjected to force.").

pretextual stops.[5] Indeed, the *Whren* Court differentiated pretextual stops from "extreme practices" like the use of deadly force.[6] Today, traffic stops and the use of deadly force are too often one and the same—with Black and Latino drivers overrepresented among those killed—and have been sanctioned by numerous counties and major police departments.[7]

While several major cities have restricted the practice,[8] in much of America, police traffic stops still seine for warrants despite the shadows of *Monell v. Department of Social Services*,[9] where a § 1983 claim can succeed against a city with a showing that city policy was the moving force behind a constitutional injury, and was implemented with deliberate indifference to the known or obvious consequence that constitutional violations

5. *See* Rushin & Edwards, *supra*, at 657-58 (noting the emergence of race-profiling research as a modern field of study).

6. *Whren*, 517 U.S. at 818.

7. Kirkpatrick et al., *supra.*

8. Los Angeles, Philadelphia, Pittsburgh, Seattle, Berkeley, and the State of Virginia have all banned or restricted pretextual stops. *Id.*; *see* Los Angeles Police Department Manual §240.06 (2022) (established by Special Order No. 3); Achieving Driving Equality, Phila. Code §§ 12-1701-1703 (2021); Pittsburgh, Pa., PGH Code Ordinances § 503.17 (2021); Seattle Police Department Manual § 6.220 (2020); Berkeley Police Dep't, Law Enforcement Services Manual §401(2) (2022); Va. Code Ann. §§ 46.2-1014, 46.2-1052, 46.2-646, 46.2-1157 (limiting ability to use evidence discovered or obtained as a result of a stop for a minor traffic violation).

9. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

would result.[10] The potential liability attending a policy of pretextual stops aside, their empirical consequences are clear: they lead to the unnecessary and tragic ending of human life. Here, a child threw a candy cane out the window. Twenty-five minutes later, the driver, her father, was dead.

To be clear, we apply only settled laws that govern this case today, cast as they are against the larger frame of their play in the streets across the country.

I.

Tavis Crane's estate and the passengers of Crane's car sued Arlington Police Officer Craig Roper and the City of Arlington for the use of excessive force during a traffic stop in violation of the Fourth Amendment. The district court dismissed the passengers' claims, finding that they could not bring claims as bystanders, and granted summary judgment to Roper and the City after determining that Roper was entitled to qualified immunity. We affirm the dismissal of the passengers' claims and vacate the grant of summary judgment on Crane's claims and remand to the district court for further proceedings consistent with this opinion.

On February 1, 2017, Tavis Crane was driving in Arlington, Texas with three passengers: Dwight Jefferson, Valencia Johnson, who was pregnant with Crane's child, and Z.C., Crane's two-year-old daughter. While Crane was stopped at a traffic light at approximately 11:38 p.m.,

10. *Alvarez v. City of Brownsville*, 904 F.3d 382, 389-90 (5th Cir. 2018) (en banc).

Officer Elsie Bowden pulled up behind him. After the light turned green, Crane pulled away from the intersection and Bowden saw an object being tossed from the passenger's side. She claims that she thought the object might be a crack pipe and called for backup; Roper responded.

Bowden turned on her police car's lights and Crane pulled over. Bowden approached the passenger side of the vehicle and asked Jefferson what he threw out the window. Jefferson replied that the only thing he threw was a cigarette butt. Bowden asked Crane for his driver's license and proof of insurance. Crane provided Bowden with his identification card, as he did not have a driver's license. Bowden then noticed an object fall on the ground behind her, outside the window by Z.C. She recognized the object as the red top of a large plastic Christmas candy cane and realized the object thrown from the car was the candy cane's clear bottom half. Bowden laughed about the misunderstanding and handed the red piece back to Z.C. But she did not send the family on. Rather, she returned to her vehicle and ran a warrant check, which found that Crane had warrants for several misdemeanors and a possible felony probation violation.

Bowden requested additional backup and confirmation of the warrants and was informed that Officer Eddie Johnson was also en route. While waiting for the other officers to arrive, she confirmed five misdemeanor warrants from Grand Prairie but was still waiting for a reply from Dallas County for the felony probation warrant, and began writing Crane a citation for driving without a license.

At 11:47 p.m., Officer Johnson arrived. Bowden informed him that the passengers had been cooperative and that she wasn't sure if Crane even knew he had a warrant out. Roper arrived after that conversation and received no briefing, knowing only the information relayed to his in-car computer display, which showed Crane's unconfirmed outstanding warrant for a felony probation violation.

All three officers then approached Crane's car at 11:50 p.m., by which point Crane had rolled up his window almost entirely. Bowden stood next to Crane's window; Roper was behind Bowden, next to Valencia Johnson, with Officer Johnson on the other side of the car, next to Jefferson. Bowden asked Crane to step out of the car because he had outstanding warrants, which Crane denied. Bowden told Crane that if he did not get out of the car, he would face additional charges. Crane said he needed to get Z.C. home to her mother. Bowden asked if he could leave Z.C. with the other passengers and alternatively offered to call someone to pick her up. Crane refused, insisting that he did not have any outstanding warrants and reiterating that he was not getting out. Bowden told him five tickets had been confirmed. Crane asked what the warrants were for. Bowden said she didn't know yet. Bowden told Crane, "I need you to step out of the car, honey. Tavis if you go and do something stupid then we are gonna be breaking windows, it's gonna get crazy, it ain't worth it."

Officer Johnson ordered Jefferson, sitting in the passenger seat, to turn off the car and give him the key. Jefferson began moving his hand toward the key to

comply, but Crane told him to stop. Roper then ordered Valencia Johnson to unlock the rear driver's side door where she was seated; she did. Roper opened the door, unholstered his pistol, and ordered everyone to put their "f---ing hands up." Crane, Jefferson, and Valencia Johnson all put their hands up. He initially pointed his pistol at Jefferson before entering the car, climbing over Valencia Johnson, and pointing his gun at Crane.

According to the passengers, Roper put his arm around Crane's neck. Roper contends that he grabbed the hood of Crane's sweatshirt. All three officers continued to order Crane to open the door and turn the car off. Officer Johnson circled behind Crane's car to move next to Bowden as she shouted "Tavis don't do it." The car engine began to rev, and the car shook as the brake lights turned on and off sporadically. Bowden reached for Roper in the back seat, and told Roper three times to "get out" of the car. Roper remained in the car. Officer Johnson broke the window next to Crane with his baton as Bowden began to move toward the rear of the car.

The passengers contend that when Crane, with Roper's gun pointed at him, moved his hand to turn off the car in compliance with Roper's order, Roper shot him, his head fell backwards, the engine revved and the car lurched backward, striking Bowden—by now behind the car—before moving forward and running over Bowden again and speeding off.

Roper claims that Crane shifted the car in gear while the two struggled, and that it was only after the car ran

over Bowden and after Roper warned Crane that he would kill him if Crane did not stop the car that Roper shot Crane twice. Roper claims that the first two shots "did not cause Crane to stop the vehicle, [so] he fired two other shots."

After Roper shot Crane, the car careened down the road and Roper took the keys out of the ignition and steered the car to a stop. Officer Johnson caught up in his squad car and told Roper to pull Crane from the driver's seat and perform CPR. Roper continued to shout and curse at Crane, asking why he had not stopped, but Crane was silent. An autopsy concluded that Crane was shot four times and died of gunshot wounds to his abdomen.

II.

On January 31, 2019, Crane's mother, as the administrator of Crane's estate and on behalf of his surviving children, and the other passengers filed a 42 U.S.C. § 1983 claim against the City of Arlington and Officer Roper, individually and in his official capacity. The plaintiffs allege that Roper violated their Fourth Amendment rights and that the City is liable under *Monell v. Department of Social Services*.[11]

The City and Roper moved to dismiss the plaintiffs' claims. The district court concluded that the passengers—Jefferson, Valencia Johnson, and Z.C.—could not bring claims as bystanders and dismissed their claims with prejudice but denied the motions to dismiss Crane's

11. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

claims.

Asserting qualified immunity, Roper then moved for summary judgment, which the district court granted. The district court acknowledged that Valencia Johnson and Roper presented different accounts of when the first shot occurred,[12] but found that "a reasonable jury could not believe [the passengers'] account of the shooting."[13] Finding Roper entitled to qualified immunity, the district court dismissed Crane's claims against Roper and the City with prejudice.[14] The plaintiffs timely appealed the order on the motion to dismiss and the grant of summary judgment.

III.

We review *de novo* a district court's grant of summary judgment.[15] Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[16] "Only disputes over facts that might affect the

12. *Crane v. City of Arlington*, 542 F. Supp. 3d 510, 513 (N.D. Tex. 2021) ("The backseat passenger swears the shot occurred *before* the car started reversing . . . . The officers claim Roper fired his gun *after* the car ran over Bowden the second time.").

13. *Id.* at 514.

14. *Id.*

15. *Aguirre v. City of San Antonio*, 995 F.3d 395, 405 (5th Cir. 2021).

16. Fed. R. Civ. P. 56(a).

outcome of the suit under the governing law will properly preclude the entry of summary judgment."[17] We may affirm on any grounds supported by the record and presented to the district court.[18]

We likewise review *de novo* a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6).[19] To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[20] When reviewing a motion to dismiss, we "must accept all facts as pleaded and construe them in the light most favorable to the plaintiff."[21]

IV.

First, we review the district court's grant of summary judgment. "When a defendant official moves for summary judgment on the basis of qualified immunity, 'the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established

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17. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

18. *Hernandez v. Velasquez*, 522 F.3d 556, 560 (5th Cir. 2008).

19. *Waste Mgmt. La, L.L.C. v. River Birch, Inc.*, 920 F.3d 958, 963 (5th Cir. 2019).

20. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

21. *Reed v. Goertz*, 995 F.3d 425, 429 (5th Cir. 2021) (internal quotation marks and citations omitted).

law.'"[22] All facts must be viewed in the light most favorable to the nonmovant and all justifiable inferences must be drawn in his favor.[23]

When there is video evidence in the record, courts are not bound to accept the nonmovant's version of the facts if it is contradicted by the video.[24] But when video evidence is ambiguous or incomplete, the modified rule from *Scott v. Harris* has no application.[25] Thus, "a court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account."[26]

The district court acknowledged the competing factual accounts—specifically when Roper shot Crane—but relied on the dashcam video from Bowden's patrol car to reject Crane's account and adopt Roper's account. But the video does *not* clearly contradict Crane's account of events such that the district court was entitled to adopt Roper's factual account at the summary judgment stage. "*Scott* was not an invitation for trial courts to abandon the standard principles of summary judgment by making credibility determinations or otherwise weighing the

22. *Aguirre*, 995 F.3d at 406 (quoting *Darden v. City of Fort Worth*, 880 F.3d 722, 727 (5th Cir. 2018)).

23. *Darden*, 880 F.3d at 727.

24. *Harris v. Serpas*, 745 F.3d 767, 771 (5th Cir. 2014) (citing *Scott v. Harris*, 550 U.S. 372, 381, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)).

25. *Aguirre*, 995 F.3d at 410 (citing *Scott*, 550 U.S. at 378).

26. *Darden*, 880 F.3d at 730.

parties' opposing evidence against each other any time a video is introduced into evidence."[27]

What happened inside Crane's car is not visible in the dashcam video. As such, the video does not resolve the relevant factual disputes. It is not clear from the video when Roper shot Crane, when Crane became unconscious, whether the car moved before or after Roper shot Crane, and whether Roper had his arm around Crane's neck or was grabbing Crane's sweatshirt. Because the video evidence does not clearly contradict Crane's account, for purposes of this appeal, we must take Crane's account as true[28] —that Roper had Crane in a chokehold and that Roper shot Crane before the car began to move.

The district court found that the gear could change and the car could move only with the conscious intention of Crane.[29] But that conclusion ignores the other plausible explanation that the gears were shifted during the struggle between Crane and Roper, as Crane attempted to comply with Roper, and that the chokehold caused Crane to press down on the accelerator as an attempt to relieve the stress on his neck, as opposed to attempting to flee. When two conclusions are plausible, at the summary judgment stage, we must accept as true that which is most favorable to the nonmovant. [30] The district court erred by

27. *Aguirre*, 995 F.3d at 410.

28. *See Darden*, 880 F.3d at 730 ("[A] court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account.").

29. *Crane*, 542 F. Supp. 3d at 514.

30. *Darden*, 880 F.3d at 727.

applying its own interpretation of the video and accepting Roper's factual account over Crane's of what occurred inside the car. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter," that job is reserved for the jury.[31]

A.

Next, we must consider whether Roper is entitled to qualified immunity under Crane's account of events. We hold he is not at this stage.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[32] When reviewing a motion for summary judgment based upon the affirmative defense of qualified immunity, we engage in a two-pronged inquiry.[33] First, the constitutional question, asking whether the officer's conduct violated a federal right.[34] Second, asking whether that right was clearly established at the time of the violation.[35]

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31. *Id.* at 730.

32. *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (internal quotation marks and citation omitted).

33. *Aguirre*, 995 F.3d at 406.

34. *Tolan v. Cotton*, 572 U.S. 650, 655-56, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam).

35. *Id.* at 656.

The constitutional question in this case is governed by the principles enunciated in *Tennessee v. Garner* [36] and *Graham v. Connor*,[37] which establish that claims of excessive force are determined under the Fourth Amendment's "objective reasonableness" standard.[38] Specifically regarding deadly force, Justice White explained in *Garner* that it is unreasonable for an officer to "seize an unarmed, nondangerous suspect by shooting him dead;" but, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[39]

We analyze the reasonableness of the force used under factors drawn from *Graham*, including the severity of the crime at issue, whether the suspect poses a threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest.[40] While all factors are relevant, the "threat-of-harm factor typically predominates the analysis when deadly force has been deployed."[41] The reasonableness is judged from the

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36. 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

37. 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

38. *Brosseau v. Haugen*, 543 U.S. 194, 197, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (quoting *Graham*, 490 U.S. at 388).

39. *Garner*, 471 U.S. at 11.

40. 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

41. *Harmon v. City of Arlington*, 16 F.4th 1159, 1163 (5th Cir. 2021).

perspective of a reasonable officer on the scene,[42] and only the facts then knowable to the defendant officers may be considered.[43]

First, we address whether Crane posed an immediate threat to the safety of the officers. Accepting the facts as the passengers allege, Crane was shot while unarmed with Roper's arm around his neck. Roper first argues that he had a reasonable fear that Crane might have a weapon. But from his position, Roper could see if Crane was reaching for a gun, as could the other officers outside the vehicle, yet none of them—including Roper—reported a suspicion of a weapon. Roper could not have reasonably suspected that Crane had a weapon.

Roper alternatively contends that the threat came from the car.[44] As seen in the video, prior to the first shot, Crane's car was parked, the engine revved, and the tires spun. As the district court noted, Roper was inside the car with the door open, so had Crane sped off, Roper could have fallen out and been seriously injured.[45]

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42. *Graham*, 490 U.S. at 396.

43. *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (per curiam); *see also Cole v. Carson*, 935 F.3d 444, 456 (5th Cir. 2019), *as revised* (Aug. 21, 2019) (en banc) ("[W]e consider only what the officers knew at the time of their challenged conduct.").

44. *See Scott*, 550 U.S. at 379, 383 (noting that, in certain circumstances, a moving vehicle can pose a threat to individuals in its vicinity).

45. *See Harmon*, 16 F.4th at 1164 ("Common sense confirms that falling off a moving car onto the street can result in serious physical injuries.").

However, accepting the facts as Crane alleges, Roper shot Crane while the car was still in park and before the car began to move. As Roper was not at imminent risk of being expelled from a parked car, the vehicle did not in this sense pose a serious threat. Roper also asserts that Bowden and Officer Johnson were in danger, but at the time Roper shot Crane, Bowden and Officer Johnson were standing to the side of Crane's car, not behind it, unlikely to be hit by the car.[46] Ultimately, the car was not a threat until it began to move, which did not occur until Roper shot Crane. Whether Roper's use of deadly force was reasonable may well turn on whether the car was in park or moving at the moment Roper shot Crane.[47] But that is a question for the jury.[48]

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46. Only after the alleged first shot did Bowden walk behind the car, when she was then run over.

47. *Compare Brosseau*, 534 U.S. at 197, 200 (holding a vehicle was a threat when it was driven in a manner indicating a willful disregard for the lives of others), *and Harmon*, 16 F.4th at 1165 (holding a vehicle was a threat as it sped off with an officer holding on to its edge), *with Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir. 2009) (holding an officer has no reason to believe a noncompliant driver in a parked car with the engine running is a threat). *But see Lytle v. Bexar County*, 560 F.3d 404, 411 (5th Cir. 2009) ("[T]he [Supreme] Court's decision in *Scott* did not declare open season on suspects fleeing in motor vehicles.").

48. *See Lytle*, 560 F.3d at 411 ("Our standard of review [in a qualified immunity] interlocutory appeal—namely, whether a reasonable jury could enter a verdict for the non-moving party—emphasizes the importance of juries in cases of alleged excessive force."). Roper provided a report from the department's forensic expert identifying the sound of two shots occurring after Bowden was shot. Roper argues that the two other shots are not audible in the video because they occurred when Crane's car was too far away

Finally, this Court considers the speed with which an officer resorts to force where officers deliberately, and rapidly, eschew lesser responses when such means are plainly available and obviously recommended by the situation.[49] Officer Bowden demonstrated an admirable attempt to negotiate with Crane. Roper, on the other hand, shot Crane less than one minute after he drew his pistol and entered Crane's backseat aside a pregnant woman and a two-year-old.[50] Not only was the option to get out of the car—as opposed to shooting Crane—plainly available, but Bowden, reached into the backseat to touch Roper, repeatedly urging Roper to "get out" of the car, reflecting the sound view that they could not use deadly force to keep Crane from fleeing. But Roper remained in the car, shooting Crane just seconds later. A reasonable jury could conclude that reasonable officers, like Bowden, would have been keenly aware that deadly force should not have been used, and that instead, Crane should have

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for the dashcam to pick up the noise. When the shots were fired, and whether there was a continuing threat that necessitated the use of deadly force, is a question that ought to be resolved by a jury. *See Mason v. Lafayette City-Parish Consolidated Gov.*, 806 F.3d 268, 278 (5th Cir. 2015) (holding an officer was entitled to qualified immunity as to the first five shots, but given the competing narratives, material fact disputes precluded qualified immunity as to the final two shots).

49. *See Harmon*, 16 F.4th at 1165.

50. We note that Roper did warn Crane that he would shoot him if he did not turn the car off. "*Garner* . . . requires a warning before deadly force is used 'where feasible,' a critical component of risk assessment and de-escalation." *Cole*, 935 F.3d at 453 (quoting *Garner*, 471 U.S. at 11). However, according to the passengers, when Crane lowered his hand to comply, Roper shot him.

been let go to take his child home; that Crane did not pose a threat of harm such that the use of deadly force was reasonable. The threat-posed factor favors Crane.

While the remaining two factors do not weigh as heavily upon our analysis, they yet demand attention.[51] As to the severity of the crime at issue, Roper was attempting to effect an arrest for an unconfirmed felony probation violation warrant and multiple confirmed misdemeanor warrants. Although police officers have the right to order a driver to exit the car,[52] they cannot use excessive force to accomplish that end.[53] Reasonable officers could debate the level of force required to effect an arrest given the severity of the violations at issue,[54] but neither of the other officers felt the need to enter the car or draw their pistols to address the severity of the violation. Rather, the arresting officer attempted to intervene to stop Roper. This factor favors Crane.

The third *Graham* factor is whether Crane was actively resisting arrest or attempting to evade arrest by fleeing. "Officers may consider a suspect's refusal to comply with instructions during a traffic stop in assessing

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51. *Aguirre v. City of San Antonio*, 995 F.3d 395, 408 (5th Cir. 2021).

52. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977).

53. *Deville*, 567 F.3d at 167.

54. *Tucker v. City of Shreveport*, 998 F.3d 165, 178 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 419, 211 L. Ed. 2d 388 (2021).

whether physical force is needed to effectuate the suspect's compliance."[55] While Crane was compliant with Bowden's initial requests, he refused to comply once the officers attempted to arrest him. It is clear from the video that the officers attempted to arrest Crane peacefully, but he refused to cooperate. Bowden first told Crane to step out of the car and within one minute she informed him that there was an outstanding warrant for his arrest. Two minutes later, Roper entered the vehicle and applied physical force, grabbing Crane, and pointing his gun at him. The other officers continued to order Crane to turn off the vehicle. On the present record, Roper shot Crane within 30 seconds of entering Crane's vehicle, as Crane reached to turn off the vehicle. The car was in park and Crane pressed the accelerator to relieve the pressure on his neck. Taking the facts as we must, a jury may well conclude that it was not reasonable for Roper to believe that Crane was attempting to flee or that any such attempt to do so posed a threat to life. Additionally, "officers must assess not only the need for force, but also 'the relationship between the need and the amount of force used.'"[56] The only confirmed warrants against Crane were for misdemeanors. A jury could reasonably find that the *degree* of force the officers used was not justifiable under the circumstances. This factor favors Crane. In sum, with all three of the *Graham* factors favoring Crane, Crane prevails.

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55. *Deville*, 567 F.3d at 167.

56. *Deville*, 567 F.3d at 167 (quoting *Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir. 1999)).

Crane argues, notwithstanding the *Graham* factors, that Roper created the situation by escalating the confrontation—entering the car and grabbing Crane. But our precedent dictates that the threat be examined only at the moment deadly force is used and that an officer's conduct leading to that point is not considered.[57] Roper's actions prior to the moment he used deadly force, escalatory as they were, cannot be considered. The issue is not whether Roper created the need for deadly force, the issue is whether there was a reasonable need for deadly force.

Under the *Graham* factors, Roper's use of deadly force was unreasonable. Because Roper's use of force in this situation was unreasonable, violating Crane's Fourth Amendment right, we now turn to the clearly established prong.

B.

The second step of the qualified immunity inquiry is asking "whether the violated constitutional right was clearly established at the time of the violation."[58] The

57. *Serpas*, 745 F.3d at 772. We recognize a split among the Circuits as to whether the officers' actions leading up to the shooting is relevant for purposes of an excessive force inquiry. *Compare id.* ("[A]ny of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit."); *with Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (considering an officer's reckless and deliberate conduct in creating the need to use force to determine the reasonableness of the force).

58. *Lytle*, 560 F.3d at 417.

purpose of this inquiry is to determine whether the officer "had fair notice that [his] conduct was unlawful."[59]

"It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[60] This applies not only to a felon fleeing on foot,[61] but also to one fleeing in a motor vehicle.[62] We note that the Supreme Court and this court decline to apply *Garner* with a high-level of generality.[63] While "[w]e do not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate."[64] The central concept is that of "fair warning,"[65] in which "the contours of the right in question are 'sufficiently clear that a reasonable official would

59. *Brosseau*, 543 U.S. at 198.

60. *Lytle*, 560 F.3d at 417.

61. *Garner*, 471 U.S. at 20-21.

62. *Lytle*, 560 F.3d at 417-18.

63. *See, e.g.*, *Brosseau*, 543 U.S. at 199; *Harmon*, 16 F.4th at 1166.

64. *Ashcroft*, 563 U.S. at 741; *see also Trent v. Wade*, 776 F.3d 368, 383 (5th Cir. 2015) ("The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." (quoting *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir.2004) (en banc))).

65. *Trent*, 776 F.3d at 383.

understand that what he is doing violates that right.'"[66] We have recognized that "qualified immunity will protect 'all but the plainly incompetent or those who knowingly violate the law.'"[67] Here, precedent provided Roper with fair notice that using deadly force on an unarmed, albeit non-compliant, driver held in a chokehold in a parked car was a constitutional violation beyond debate.

At the time of Roper's use of deadly force, "the law was clearly established that although the right to make an arrest 'necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it,'"[68] the constitutionally "permissible degree of force depends on the severity of the crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee."[69] In *Garner*, the Supreme Court made clear that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[70]

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66. *Breen v. Texas A&M Univ.*, 485 F.3d 325, 338 (5th Cir. 2007), *withdrawn in part on reh'g*, 494 F.3d 516 (5th Cir. 2007) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).

67. *Harmon*, 16 F.4th at 1167 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

68. *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (footnote omitted) (quoting *Saucier*, 533 U.S. at 201-02).

69. *Id.*

70. *Garner*, 471 U.S. at 11.

Here, under Crane's account, Crane was shot while he was held in a chokehold in a parked car while evading arrest for several confirmed misdemeanors and an unconfirmed felony parole violation. Roper was on notice that the use of deadly force is objectively reasonable only where an officer has "a reasonable belief that he or the public was in imminent danger ... of death or serious bodily harm."[71] Again, Roper's alleged belief that Crane had a gun was not reasonable, nor was his belief that a parked car posed a danger to himself, the passengers, or the other officers standing on the side of the car. When we accept the facts as we must, this case is an obvious one.[72] "While the Fourth Amendment's reasonableness test is 'not capable of precise definition or mechanical application,"[73] the test is clear enough that Roper should have known he could not use deadly force on an unarmed man in a parked car.

Because the facts seen in the light most favorable to Crane indicate a violation of a clearly established right and material facts are in dispute, the district court erred in granting summary judgment to Roper and perforce dismissing the City.

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71. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004).

72. *See Roque v. Harvel*, 993 F.3d 325, 335 (5th Cir. 2021) ("[I]in an obvious case, general standards can 'clearly establish' the answer, even without a body of relevant case law." (cleaned up) (quoting *Brosseau*, 543 U.S. at 199)); *see also Darden*, 880 F.3d at 733 ("[I]n an obvious case, the *Graham* excessive-force factors themselves can clearly establish the answer, even without a body of relevant case law.").

73. *Bush*, 513 F.3d at 502 (quoting *Graham*, 490 U.S. at 396).

V.

We turn to the claims of the three passengers—Jefferson, Valencia Johnson, and Z.C.—against Roper and the City, suing under § 1983 and claiming that Roper's actions violated their Fourth Amendment rights. The passengers argue that they are entitled to damages under two theories of liability.

First, they claim that they suffered emotional trauma by witnessing the excessive use of force against Crane. But witnessing the use of force is not enough. "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."[74] "Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing [ ] police action."[75] Thus, bystanders may recover when they are subject to an officer's excessive use of force such that their own Fourth Amendment right is violated; however, bystanders cannot recover when they only witness excessive force used upon another.[76]

Second, the passengers claim that Roper used excessive force when he pointed his gun at them while

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74. *Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

75. *Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985).

76. *Harmon*, 16 F.4th at 1168 ("Bystander excessive force claims can only succeed when the officer directs the force toward the bystander—that is to say, when the bystander is not really a bystander.").

entering the car, leading to psychological injuries.[77] The district court dismissed the passengers' claims for failing to "establish that they were the objects of Roper's actions or that Roper's actions physically injured them."[78]

There is no express requirement for a physical injury in an excessive force claim,[79] but even if the passengers stated a plausible claim for psychological injuries, Roper is entitled to qualified immunity. "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[80] We previously held that pointing a gun can be reasonable given the circumstances,[81] and that "the momentary fear experienced by the plaintiff when a police officer pointed a gun at him did not rise to the level of a constitutional violation[.]"[82] Here, there was no

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77. Roper argues that the passengers waived this argument, but the complaint states that the passengers sought damages for the psychological injuries arising both from witnessing Crane's death and as a result of Roper's excessive force, preserving this argument.

78. *Crane v. City of Arlington*, 2020 U.S. Dist. LEXIS 125222, 2020 WL 4040910, at *6 (N.D. Tex. July 16, 2020).

79. *Flores*, 381 F.3d at 400-01.

80. *Graham*, 490 U.S. at 396.

81. *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1230-31 (5th Cir. 1988).

82. *Dunn v. Denk*, 54 F.3d 248, 250 (5th Cir. 1995), *on reh'g en banc*, 79 F.3d 401 (5th Cir. 1996) (discussing *Hinojosa*, 834 F.2d at 1230-31).

unreasonable use of force against the passengers, so no constitutional injury occurred.

As we affirm the dismissal of the passengers' claims against Roper for a failure to state a claim in the absence of a constitutional injury, we also affirm the dismissal of their claims against the City.

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We AFFIRM the dismissal of the passengers' claims and VACATE the grant of summary judgment on Crane's claims and REMAND to the district court for further proceedings consistent with this opinion.

APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED JUNE 8, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:19-cv-0091-P

DE'ON L. CRANE, *et al.*,

Plaintiffs,

v.

THE CITY OF ARLINGTON, TEXAS
AND CRAIG ROPER,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

On February 1, 2017, Arlington police initiated a routine traffic stop of Tavis Crane, which led to Crane's car running over an officer twice, and another officer, defendant officer Craig Roper, shooting Crane dead. Crane's mother, on behalf of his estate, sued Roper and the City of Arlington, claiming Roper used excessive force. The law pardons an officer's use of force—even deadly force—when the officer reasonably believed that a suspect posed a threat of serious harm. That was true here. But Plaintiffs argue that the threat of harm only arose because Roper escalated the situation. Although

the Court is sympathetic to this argument, it isn't the law. The Court can only consider the threat from the officer's perspective "*at the moment of the threat . . . .*" *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014) (emphasis in original). Applying the applicable law, there is no genuine issue of material fact, and Roper is entitled to judgment as a matter of law. Accordingly, Roper's motion will be **GRANTED**.

BACKGROUND

On February 1, 2017, at about 11:45 p.m., Arlington police officer Bowden was patrolling the streets when she noticed something shiny—possibly drug paraphernalia—tossed out of a car. Pl.'s MSJ App'x at 2. She stopped the car on the side of the road, parking her car behind it. Roper's MSJ App'x at 151, ECF No. 69. The suspect car had four occupants. Pl.'s MSJ App'x at 1. Tavis Crane, the decedent in this wrongful-death and survival action, was driving. *Id.* The front passenger was an adult male, and the backseat had an adult woman and a toddler. *Id.* Officer Bowden obtained their ID cards and asked them about the object. As she talked with them, the toddler threw a chunk of candy cane out the window. *Id.* at 2. The candy's plastic wrapper shined in the light. *Id.* at 2. Officer Bowden now believed there was no drug paraphernalia, only candy. *Id.*

But when she ran Crane's name, he was wanted for five warrants, including one for violating parole on an evading-arrest charge. Roper's MSJ App'x at 135, 138. Due to these warrants, and the car's three other occupants, Bowden called for backup. *Id* at 138. Two other officers arrived,

including defendant Officer Roper, and together they approached the car—which was still running. *Id.* Bowden and Roper stood on the driver's side. Bowden respectfully asked Crane to get out of the car. *Id.* at 151 (Bowden's dashboard video). He refused. *Id.* Demonstrating model policing, Bowden politely, calmly, and firmly negotiated with Crane—for more than two minutes—to turn the car off and step out of the car. *Id.* But he refused. *Id.* As this continued, Crane's cooperation vanished and was replaced with hostility. *Id.* He would not listen to Bowden and justified himself by saying he had done nothing wrong. *Id.* The officers started to suspect that Crane would drive off, and the passenger-side officer asked the front-seat passenger to turn the car off. *Id.* at 138-39, 151. Crane stopped the passenger and said that he was not turning the car off. *Id.* at 144, 151.

As Crane's resistance hardened, Roper promoted his role from sideline participant to main player. All the car's doors were locked, so Roper gestured for the backseat passenger to unlock her door. *Id.* at 144, 151. She complied, and Roper opened the door. *Id.* at 151. He stepped into the car, one foot in and one foot out. The tension immediately and drastically increased. *Id.* Although the accounts differ, it is undisputed that Roper quickly unholstered his pistol and aimed it at Crane. *Id.* at 144; Pl.'s MSJ App'x at 2. The other two officers scrambled around the car, trying to bust the windows so they could reach in and turn off the ignition. Def.'s MSJ App'x at 151. The scene was chaotic. Inside the car, Roper used his left arm to wrestle Crane, and his right hand had his gun pressed against Crane's side. *Id.* at 144; Pl.'s MSJ App'x at 2. Roper threatened

to kill Crane if he would not turn the car off. *Id.* During this struggle, Crane pressed the gas down, causing the car's engine to roar, tires to spin, and sending smoke up around the car. Def.'s MSJ App'x at 151.

The following events occurred very quickly. As Officer Bowden started to run around the back of the car, the car launched into reverse, plowing over Bowden, and smashing into her police car. *Id.* Crane's car then changed gears and took off forward. *Id.* As it moved forward, the back of Crane's car visibly rises and falls as it runs over Bowden a second time. *Id.* As Crane's car continues down the street, an officer radios out, "officer down!" *Id.* Somewhere amidst this chaos, Roper point-blank shot Crane in the ribs. *Id.* at 146; Pl.'s MSJ App'x at 3. The backseat passenger swears the shot occurred *before* the car started reversing. Pl.'s MSJ App'x at 3. The officers claim Roper fired his gun *after* the car ran over Bowden the second time. Def.'s MSJ App'x at 146. The gear shift was on the steering column. *Id.* at 144. Either way, as the car sped down the road, Roper—hanging partially out the open back door—shot Crane two more times. *Id.* at 146, 151. Roper then managed to put the car into neutral and guide it to a controlled stop into a curb. *Id.* at 146. Crane was later pronounced dead. *Id.* at 147.

Crane's mother, acting as administrator of his estate, sued Roper and the City of Arlington, seeking damages for Roper's use of excessive force. Pl.'s 2nd Amend. Comp't at 14, ECF No. 30. Roper asserted the defense of qualified immunity and moved for summary judgment on the issue. ECF No. 67. The issue is now briefed and ripe for review.

Appendix B

STANDARD

The Court must grant summary judgment when there is "no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact exists "if the record, taken as a whole, could lead a rationale trier of fact to find for the non-moving party." *Malbrough v. Stelly*, 814 F. App'x 798, 802 (5th Cir. 2020). Thus, "the 'mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient' to defeat summary judgment; 'there must be evidence on which the jury could reasonably find for the plaintiff.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). When making these judgments, the Court must view the facts and draw reasonable inference in the light most favorable to the party opposing the summary-judgment motion. But when a "videotape quite clearly contradicts the version of the story told by" that party, the Court has no duty to accept it. *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (Scalia, J.). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380.

ANALYSIS

"When a defendant claims qualified immunity as a defense, the burden shifts to the plaintiff, who must rebut the defense." *Goldston v. Anderson*, 775 F. App'x 772

(5th Cir. 2019). Therefore, in this case, Crane must show (1) that Roper violated a constitutional right and (2) that Roper's conduct was "objectively unreasonable in light of clearly established law at the time of the violation." *Id.* Crane alleges that Roper violated Crane's right to be free from excessive force. To satisfy the first element, Crane must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Id.* at 773 (quoting *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005)). This case's outcome hinges on whether Roper's use of force was "clearly excessive" and "clearly unreasonable."

Binding precedent sharpens the meaning of these platitudes. To begin with, an "officer's use of deadly force is not excessive when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or others." *Id.* (quoting *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009)). Also, the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "Importantly, the inquiry focuses on the officer's decision to use deadly force, therefore 'any of the officer's actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in the Fifth Circuit.'" *Waller v. City of Fort Worth*, F. Supp. 3d , 2021 U.S. Dist. LEXIS 11904, 2021 WL 233571, *4 (N.D. Tex. Jan. 25, 2021) (Pittman, J.) (quoting *Harris*, 745 F.3d at 772). These precedents built qualified immunity into a nearly insurmountable obstacle. *See e.g., Ramirez v. Guadarrama*, 844 F. App'x 710 (5th

Cir. 2021) (holding qualified immunity barred suit when officers found suspect doused in gasoline, knew their tasers would ignite him, and quickly tased him, "causing him to burst into flames").

Applying this law to these facts, Crane failed to show Roper's use of force was clearly excessive. This is true even under Crane's account of the shooting, where Roper shot Crane before the car went into reverse. Even under Crane's account, the following facts are true: Crane had not been complying for more than two minutes; he was wanted on a parole violation for evading arrest; he refused to turn the car off and rolled up the windows; inside the running car were four occupants, including a toddler, and outside the car were two officers; the car was on a residential street; and Roper was half-in and half-out an open door. Given these facts, it was reasonable for Roper to conclude that Crane posed a threat of serious harm to both himself and others. *See Goldston*, 775 F. App'x at 773 (holding reasonable for officer to use deadly force when he knew (1) other officer was behind suspect's car, (2) suspect had been disobeying commands, and (3) suspect had warrants for evading arrest).

However, a reasonable jury could not believe Crane's account of the shooting. Under Crane's account, after Roper shot Crane, Crane's "head [fell] backwards and then the car began to move backward until it ran into something. After the car ran into something, it started to go forward . . ." Pl.'s MSJ App'x at 3. Not only does this not make sense (how is the car shifting gears?), the video contradicts it. *See Scott*, 550 U.S. at 378. The car did not

merely "move" backward and forward, it accelerated—fast. These events require coordination between a foot on the accelerator and a hand shifting gears. Only Crane was in position to do this. And in Crane's account, his head was back and he was apparently unconscious while this occurred. Pl.'s MSJ App'x at 3. Thus, Crane's account excludes the possibility that *he* drove the car after being shot. But if he didn't drive the car, nobody else could have. Given the facts before the Court—including the dashboard video—the Court concludes that Crane's account is unbelievable and therefore adopts the officers' story. Under the officers' story, the reasonableness of Roper's use of force becomes even stronger. *See Malbrough*, 814 F. App'x 3d at 805 (holding officer's use of force reasonable when suspect drove car near officers and heard "officer down").

Crane's counter argument is reasonable but wrong. Crane argues that Roper escalated the situation. The Court agrees that a reasonable jury could conclude that Roper's acts intensified emotions and contributed to the dangerous situation. But that is irrelevant. Under Fifth Circuit precedent, the "excessive force inquiry zeros in on whether officers or others were 'in danger *at the moment of the threat* that resulted in the officer's use of deadly force.'" *Id.* at 803 (quoting *Harris*, 745 F.3d at 773 (emphasis in original)). In other circuits, an officer's "reckless and deliberate conduct" that creates the need to use deadly force must be considered. *Id.* (quoting *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997)). But in the Fifth Circuit, these facts are irrelevant—and not just irrelevant, their consideration is prohibited. *Id.* This

is well-settled law. *See Waller*, 2021 U.S. Dist. LEXIS 11904, 2021 WL 233571, at *4 n.2 (citing cases). As a result, Crane's argument is unpersuasive.

CONCLUSION

For these reasons, the Court concludes that Crane failed to show that Roper violated his right to be free from excessive force because Roper reasonably believed that Crane posed a threat of serious harm to himself, officers, or others. Since this conclusion disposes of Plaintiff's claim, analysis of the remaining issues is unnecessary. Accordingly, Roper's motion for summary judgment is **GRANTED**. As a result, Crane's claims against Roper are **DISMISSED with prejudice**.

Further, a municipality like the City of Arlington cannot be held liable when its employee did not violate the Constitution. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986). Since the Court has concluded that Roper did not violate Crane's right to be free of excessive force, the City cannot be liable. Accordingly, Crane's claims against the City of Arlington are also **DISMISSED with prejudice**.

SO ORDERED on this **8th day** of **June, 2021**.

/s/ Mark T. Pittman
Mark T. Pittman
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 24, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10644

DE'ON L. CRANE, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TAVIS M. CRANE AND ON BEHALF OF THE STATUTORY BENEFICIARIES, G. C., T. C., G. M., Z. C., AND A. C., THE SURVIVING CHILDREN OF TAVIS M. CRANE; ALPHONSE HOSTON; DWIGHT JEFFERSON; VALENCIA JOHNSON; Z. C., INDIVIDUALLY, BY AND THROUGH HER GUARDIAN ZAKIYA SPENCE,

Plaintiffs-Appellants,

versus

CITY OF ARLINGTON, TEXAS; CRAIG ROPER,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of Texas
USDC No. 4:19-CV-91

ON PETITION FOR REHEARING EN BANC

Appendix C

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

PER CURIAM:

The petitions for rehearing en banc are DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, six judges voted in favor of rehearing (Richman, Jones, Smith, Duncan, Oldham, and Wilson), and ten voted against rehearing (Stewart, Elrod, Southwick, Haynes, Graves, Higginson, Willett, Ho, Engelhardt, and Douglas).

Appendix C

JAMES C. HO, *Circuit Judge*, concurring in denial of rehearing en banc:

The dissent persuasively argues why the panel should've affirmed. And that's what I would've done had I been a member of the panel.

That's because I firmly agree that it's not the job of the judiciary to second-guess split-second, life-and-death decisions made by police officers who act in a reasonable, good faith manner to protect innocent law-abiding citizens from violent criminals. These same themes have been sounded in our recent cases like *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc), *Winzer v. Kaufman County*, 940 F.3d 900 (5th Cir. 2019) (denying rehearing en banc), and (again) *Cole v. Carson*, 957 F.3d 484 (5th Cir. 2020) (en banc). *See also Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020).

But here's the problem: These themes appeared in our *dissenting* opinions (which I either joined or authored). The majority of the en banc court rejected those concerns in case after case.

Meanwhile, en banc majorities on our court have also committed a second category of error. It *should* be the job of the judiciary to hold police officers and public officials accountable for violating a citizen's established or obvious constitutional rights. But once again, the majority of the en banc court has rejected that view in case after case. *See, e.g.*, *Gonzalez v. Trevino*, F.4th , (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc) (collecting cases).

To be sure, that's the opposite problem of the one presented in this case—instead of subjecting officers to trial who shouldn't be on trial, we immunize officers from trial who shouldn't be immune. But both problems plague our en banc court, and illustrate the futility of granting rehearing en banc today. "We grant qualified immunity to officials who trample on basic First Amendment rights—but deny qualified immunity to officers who act in good faith to stop mass shooters and other violent criminals." *Id.* at _. As a result, "officers who punish innocent citizens are immune—but officers who protect innocent citizens are forced to stand trial. Officers who deliberately target citizens who hold disfavored political views face no accountability—but officers who make split-second, life-and-death decisions to stop violent criminals must put their careers on the line for their heroism." *Id.* at _.

In short, "we grant immunity when we should deny—and we deny immunity when we should grant." *Id.* at _.

It's a disturbing and dangerous pattern. And it's confusing to citizens and police officers in our circuit. As the dissent here rightly observes, "we sow the seeds of uncertainty in our precedents—which grow into a briar patch of conflicting rules, ensnaring district courts and litigants alike." *Post*, at (Oldham, J., dissenting from denial of rehearing en banc). The dissent expresses further exasperation because this should've been a straightforward case—after all, "[i]t's all on video. And if a picture is worth 1,000 words, query how much this video is worth." *Id.* at _.

I agree. In fact, I would say (and I *did* say) the exact same things last year in *Edwards v. Oliver*, 31 F.4th 925 (5th Cir. 2022). Like this case, *Edwards* involved a police officer shooting at a driver in an effort to prevent serious or fatal injury to innocent bystanders. In my panel dissent in *Edwards*, I explained that that case was factually indistinguishable from an earlier case that our court had just decided the previous year. I noted that video evidence in the two cases confirmed the similarities in the two police actions. The officers in the two cases took similar action in response to a similar threat. A panel of our court granted immunity to the officer in the earlier case. Yet the panel majority denied immunity to the officer in *Edwards*.

So *Edwards* presented the exact same problems of "uncertainty" and "conflicting rules" that rightly concern the dissent today. Yet our court denied the officer's petition for rehearing en banc in *Edwards*—no doubt making the same judgment call about the futility of rehearing en banc in that case that I do in this case.

* * *

I have no desire to tilt at windmills. En banc rehearing can be taxing on our court, but well worth the effort—so long as there's a genuine opportunity to advance the rule of law.

But I see no hope of advancing the cause here. Rehearing this case en banc would be futile. *See, e.g.*, *Cole*, 935 F.3d 444 (en banc majority reaching same result as panel majority). It doesn't matter that I fully agree with

the dissent. Seven votes (the six dissenters and me) do not a majority make on our en banc court. We had seven votes in *Cole*, too—and it wasn't enough there, either. *See id.*

I share the frustration of my dissenting colleagues today—as well as my dissenting colleagues in *Cole* and *Winzer*, those who voted (in the minority) for rehearing en banc in *Gonzalez*, and my colleagues in futility in still other cases. That frustration is what leads me to vote to deny rehearing en banc today.

Appendix C

ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, DUNCAN, and WILSON, *Circuit Judges*, dissenting from the denial of rehearing en banc:

Our refusal to take this case en banc is revelatory of a general reluctance (at best) or refusal (at worst) to devote the full court's resources to qualified-immunity cases. That's imprudent.

Officer Roper made a split-second decision to shoot a noncompliant driver (Crane) in the heat of a wrestling match just before Crane *twice ran over* another officer with his car. For several minutes, Crane (who had five outstanding warrants) repeatedly ignored commands to turn off and exit the car. Crane then pressed the accelerator causing the tires to spin and smoke and the engine to rev. At this point, Officer Roper sensibly concluded that Crane was going to kill or seriously injure someone using a three-ton projectile—so he shot Crane. It's all on video. And if a picture is worth 1,000 words, query how much this video is worth.

So why did the panel deny qualified immunity? The opinion begins by explaining why (in its view) *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), was wrongly decided. Never mind that *Whren* is a unanimous, landmark Supreme Court decision that has nothing to do with excessive force. Then the panel holds that the obvious-case exception vitiates the officer's qualified immunity. Never mind that neither our court nor the Supreme Court has applied that exception in a split-second excessive-force case. And never mind that the panel's theory of events—that Crane was shot in the chest at point-blank range and only then somehow managed to

drive over a police officer twice—is belied by the video and common sense.

In split-second excessive-force cases, it's "especially important" to define clearly established law with specificity and not at a "high level of generality." *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (quotation omitted). The panel decision instead uses the obvious-case exception to swallow the *Mullenix* rule. *But see District of Columbia v. Wesby*, 138 S. Ct. 577, 590, 199 L. Ed. 2d 453 (2018) (emphasizing the obvious case should be "rare").

So why did we deny rehearing en banc? True, qualified-immunity cases are fact-dependent. But so are, say, criminal-procedure cases. That doesn't make either unimportant—as evidenced by the fact that the Supreme Court takes at least one case from one or both categories every Term. If fact-sensitive cases like these warrant the Supreme Court's discretionary jurisdiction, they certainly warrant ours. And by refusing to rehear this case and others like it, we sow the seeds of uncertainty in our precedents—which grow into a briar patch of conflicting rules, ensnaring district courts and litigants alike.

To paraphrase Justice Thomas's view in a different context, some judges' disagreement with qualified immunity "has found its natural complement in other judges' distaste for correcting errors en banc, no matter how blatant, repetitive, or corrosive of circuit law." *Shoop v. Cunningham*, 143 S. Ct. 37, 44-45, 214 L. Ed. 2d 241 (2022) (Thomas, J., dissenting from denial of certiorari).

I respectfully dissent.

APPENDIX D — DENIAL OF PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 24, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10644

DE'ON L. CRANE, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TAVIS M. CRANE AND ON BEHALF OF THE STATUTORY BENEFICIARIES, G. C., T. C., G. M., Z. C., AND A. C., THE SURVIVING CHILDREN OF TAVIS M. CRANE; ALPHONSE HOSTON; DWIGHT JEFFERSON; VALENCIA JOHNSON; Z. C., INDIVIDUALLY, BY AND THROUGH HER GUARDIAN ZAKIYA SPENCE,

Plaintiffs-Appellants,

versus

CITY OF ARLINGTON, TEXAS; CRAIG ROPER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CV-91

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges.*

Appendix D

PER CURIAM:

IT IS ORDERED that the petition of the City of Arlington, for panel rehearing is DENIED.